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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether traders of commodity futures contracts may invoke the powers of the federal district courts in order to enforce Sections 4a, 4b and 9(b) of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §§6a, 6b and 13(b), against a futures commission merchant?

Related questions are presently before this Court:

Whether § 4b of the Commodity Exchange Act provides customers with a private right of action for damages against their brokers ("futures commission merchants") is the subject of the pending petition in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* No. 80-203.

Whether there is a private right of action for damages against a commodity exchange (a designated "contract market" for the trading of futures contracts) and its officials under § 5(d), §5a(8) or § 9(b) of the Commodity Exchange Act is the subject of the pending petition in *New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi* v. *Neil Leist, Philip Smith and Incomco,* No. 80-757.

PARTIES BELOW

The parties to the three consolidated appeals below were:

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomco.

Appellees: Clayton Brokerage Co. of St. Louis, Inc.,* Heinold Commodities, Inc., Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi.

No. 79-7464

Appellant: Incomco.

Appellee: The New York Mercantile Exchange.

No. 79-7482

Appellant: National Super Spuds, Inc.

Appellees: Heinold Commodities, Inc. and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc.

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*Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the Petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc. ("Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Clayton or Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional, Statutory and Regulatory Provisions Involved	2
Statement of the Case	2
Reasons for Allowance of the Writ of Certiorari	7
I. The questions of federal law presented by this case are of national importance and should be decided by this Court at this time	7
A. This Court should exercise its jurisdiction in this case to assure that private rights of action based upon the Commodity Exchange Act are not created by judicial legislation	8
B. There is substantial and recurrent disagreement among the federal judiciary concerning whether private civil actions for damages are among the remedies available for violation of sections 4b and 9b of the Commodity Exchange Act	10

C. There is continued uncertainty concerning the basis for implying private rights of action from federal statutes which do not, in express terms, create such rights . 13

II. The Court of Appeals' decision to recognize private rights of action for violations of the Commodity Exchange Act conflicts with the applicable decisions of this Court 18

A. The majority's refusal to examine the congressional intent to create the private rights of action asserted by respondents cannot be reconciled with this Court's decision in *Touche Ross* 18

B. The majority's failure to treat Congress' designation of remedies for violations of the CEA as exclusive is in derogation of the principles enunciated in *Transamerica* 19

C. The decision below results in an unconstitutional usurpation of legislative power by the court 21

Conclusion 23

TABLE OF AUTHORITIES

Cases:

Alken v. Lerner, 485 F. Supp. 871 (D.N.J. 1980) 12

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 9,22

Bratton v. Shiffrin, 15 Av. Cas. 18,076 (7th Cir. March 10, 1980) 17

Cannon v. University of Chicago, 441 U.S. 677 (1979) .. 7,9, 14,17,18,22

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 14,22

Chumney v. Nixon, 615 F. 2d 389 (6th Cir. 1980) 16

Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F. 2d 216 (6th Cir. 1980) 8,10,12,19

Deneau v. Amtel, Inc., [current] Fed. Sec. L. Rep. (CCH) ¶97,645 at p. 98,459 (S.D.N.Y. 1980) 11

Fischer v. Rosenthal & Co., 481 F. Supp. 53 (N.D. Tex. 1979)..... 12

Gonzalez v. Paine, Webber, Jackson & Curtis, Inc., 493 F. Supp. 499 (S.D.N.Y. 1980)..... 12

Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967) 15,16

Liang v. Hunt, 477 F. Supp. 891 (N.D. Ill. 1979)..... 19

Marbury v. Madison, 1 Cranch 137 (1803) 21

NAACP v. Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979) 17

National Sea Clammers Ass'n v. City of New York, 616 F. 2d 1222 (3d Cir. 1980) 16

Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart Inc., 465 F. Supp. 585 (M.D. La. 1979) 12

Rogers v. Frito-Lay, Inc., 611 F. 2d 1074 (5th Cir. 1980. 17

Santa Fe Industries v. Green, 430 U.S. 462 (1977)..... 22

Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1942).... 21

Sierra Club v. Andrus, 610 F. 2d 581 (9th Cir. 1979).... 17

Taylor v. Brighton Corp., 616 F. 2d 256 (6th Cir. 1980). 17

Texas & P. Ry. Co. v. Rigsby, 241 U.S. 33 (1916) 19

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).. 5,7,9,14,15,18,21,22

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 5,7,14,19,21

T.V.A. v. Hill, 437 U.S. 153 (1978) 21

United States v. Capeletti Brothers, Inc., 621 F. 2d 1309 (5th Cir. 1980)..... 17

Vega v. First Federal Savings & Loan Ass'n of Detroit, 622 F. 2d 918 (6th Cir. 1980) 17

Constitutional Provisions:

Article I, Section 1, United States Constitution 21

Statutes:

The Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*:

Sections 1-9, 7 U.S.C. §§1-13 4

Section 4a, 7 U.S.C. §6a 4,5,9,10,11,13,15,18,23

Section 4b, 7 U.S.C. §6b 4,5,8,9,10,11,12,13,15,19,23

Section 4f, 7 U.S.C. §6f 2

Section 5a, 7 U.S.C. §7a..... 2

Section 5a(8), 7 U.S.C. §7a(8).....4,5,6,11

Section 5a(11), 7 U.S.C. §7a(11) 4

Section 5a(11)(ii), 7 U.S.C. §7a(11)(ii) 22

Section 5(d), 7 U.S.C. §7(d) 4,5,6,11

Section 6(a), 7 U.S.C. §8 14

Section 6(b), 7 U.S.C. §9 14

Section 6c, 7 U.S.C. §13a-1 14

Section 6d, 7 U.S.C. §13a-2 20

Section 9, 7 U.S.C. §13 14

Section 9(b), 7 U.S.C. §13(b) 4,5,9,10,11,13,15,18,23

Section 13, 7 U.S.C. §13c 20

Section 14, 7 U.S.C. §18 4,14,20

15 U.S.C. §§1-2 4

15 U.S.C. §15 4

15 U.S.C. §78j(b) 9

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 4

28 U.S.C. §1337 4

Commodity Futures Trading Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (1974) 15

Rules:

17 CFR §240.10b-5 9

Fed. R. Civ. P. 12(c) 4

Fed. R. Civ. P. 56(b) 4

Other Authorities:

35 Bus. Law. 691 (Special Issue) (March 1980) 7,13

Wall Street Journal, Jan 9., 1979, p. 30, col. 1 (Midwest Ed.) 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion and Order of the District Court dismissing the claims of the Respondents herein against Petitioner and others insofar as the claims arose under provisions of the Commodity Exchange Act is published at 470 F. Supp. 1256 and is reprinted as Appendix B hereto, pp. A 168-185. The majority and dissenting Opinions of the Court of Appeals, reversing the judgment of the District Court are not yet officially reported, but are unofficially reported at [current binder] Comm. Fut. L. Rep. (CCH) ¶21,051, and are reprinted as Appendix A hereto, pp. A 1-167.

JURISDICTION

The judgment of the Court of Appeals is dated July 8, 1980 and was entered on that date. On July 22, 1980 Petitioner timely

filed a Petition For Rehearing And Suggestion Of Appropriateness Of A Rehearing En Banc which was denied by orders entered on September 9, 1980. This Petition is filed within 90 days of that denial.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The texts of Article I, Section 1 of the Constitution of the United States; the Commodity Exchange Act, 7 U.S.C. §§ 1-24, as amended, and Commodity Futures Trading Commission ("CFTC") Rule 150.10, 17 CFR § 150.10 are reprinted in Appendix F hereto, pp. A 192 - A 292.

STATEMENT OF THE CASE

This case arises out of commodity futures trading conducted on the New York Mercantile Exchange (the "Exchange") during the months of March, April and May, 1976 and involving contracts requiring the delivery of Maine grown potatoes during the month of May, 1976, (the "May Contract").

The Exchange is a board of trade, designated as a "contract market" by the CFTC pursuant to Section 5a of the CEA, 7 U.S.C. § 7a. The Exchange provides an organized, regulated marketplace in which contracts for the future delivery of certain specified commodities may be traded.

Petitioner, Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") is a futures commission merchant (an "FCM"), registered as such with the CFTC pursuant to Section 4f of the CEA, 7 U.S.C. § 6f. Clayton, as an FCM, acts as a broker for persons desiring to trade commodity futures contracts, buying and selling futures contracts for the accounts of its customers on

the various contract markets of which it is a member, all pursuant to the instructions of its customers.[1]

The Respondents, at all relevant times, were professional participants in the futures markets. Neil Leist was a member of the Exchange, engaged in trading commodity futures for his own account. Incomco was a partnership, duly registered with the CFTC as an FCM. Philip Smith was the managing partner of Incomco.

During the course of trading in the May Contract, Respondents acquired substantial long positions in the May Contract, speculating that the price of the contract would rise, enabling them to liquidate their positions at a profit. Various other traders, principally John R. Simplot and Peter J. Taggares and/or companies controlled by them, (the "Short Traders"), acquired substantial short positions in the May Contract. The Short Traders acquired their positions in the May Contract in their accounts with various FCMs, including Clayton, Heinold Commodities, Inc. ("Heinold") and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc. ("TMAK").

As the trading in May Contracts came to its scheduled conclusion, Respondents liquidated their long positions in the May Contract by selling offsetting short positions in the May Contract. The Short Traders' positions were not liquidated before the conclusion of trading and, pursuant to the terms of the May Contract, delivery of 50,000 pounds of Maine potatoes was required to satisfy each unliquidated May Contract. The Short Traders failed to make the required delivery respecting their open positions, thereby causing a default.

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[1] More complete descriptions of the functions and operations of the commodity futures markets and the participants are set forth in the Opinion of the Majority in the Court of Appeals (A 6-12) and in the Opinion of the District Court (A 172-174).

In September, 1976, Respondents filed suit in the United States District Court for the Southern District of New York, naming as defendants the Short Traders and their FCMs, including Clayton, Heinold and TMAK, the Exchange and certain of its officers, and certain others, all of whom (with the exception of the Exchange and its officers) were alleged to have participated in a conspiracy to manipulate downward the price of the May Contract. The conspiracy allegedly violated the provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1-13[2] and Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and damaged the Respondents in the amount of $1,300,000.00 by diminishing the sums received by them on liquidation of their positions in the May Contract. The jurisdiction of the District Court was premised solely upon 28 U.S.C. §§ 1331, 1337 and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15.

Clayton, the Exchange, Heinold and TMAK moved for judgment on the pleadings or alternatively for summary judgment pursuant to Rules 12(c) and 56(b), Fed. R. Civ. P. In support of the motions, the movants pointed out that the CEA does not make any provision for private rights of action such as those asserted by Respondents. Instead, the reparations procedures prescribed by Section 14 of the CEA, 7 U.S.C. § 18, and arbitration made available pursuant to Section 5a(11) of the CEA, 7 U.S.C. § 7a(11), are the only private remedies available for

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[2]The complaint does not specify which sections of the CEA were allegedly violated. The Court of Appeals treated the case as one in which sections 4a (prohibiting excessive speculation in commodity futures), 4b (prohibiting generally cheating and defrauding of customers), 5(d) (requiring boards of trade to make provisions to prevent manipulation), 5a(8) (requiring boards of trade to enforce their rules) and 9(b) (making manipulation of commodity prices a felony) of the CEA were at issue.

violation of a provision of the CEA. The District Court granted the motions in part, dismissing those claims asserted against the movants which were based on provisions of the CEA. The District Court held that private rights of action against FCMs and boards of trade are not among the remedies available for alleged violations of the CEA.

Respondents appealed the Order of the District Court to the Court of Appeals for the Second Circuit.[1] On July 8, 1980, a majority of the panel of the Court of Appeals reversed the Order of the District Court and held that private rights of action are to be implied against FCMs from Sections 4a, 4b and 9(b) of the CEA and against boards of trade from Sections 5(d), 5a(8) and 9(b) of the CEA. Judge Mansfield dissented from the holding of the Majority. In a well reasoned opinion, he noted that the Majority's holding rested on a principle of statutory construction which was inapplicable and that it sanctioned the very type of judicial legislation which was rejected, in principle, by this Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979).

Clayton, Heinold, TMAK and the Exchange each filed timely petitions for rehearing. On September 9, 1980, the Court of Appeals denied the petitions.

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[1]The Order of the District Court was entered in respect of claims asserted in several cases which were consolidated for pre-trial purposes. The plaintiffs in two other suits, *National Super Spuds, Inc., et al.* v. *New York Mercantile Exchange, et al.*, 76 Civ. 2375, 2554, 2571, 2594 (LFM) and *Incomco* v. *New York Mercantile Exchange, et al.*, 76 Civ. 2648 (LFM), also appealed from the District Court's Order. The three appeals were consolidated in the Court of Appeals. Clayton was a party only to the appeal in *Leist* v. *Simplot*, No. 79-7402.

By this Petition, Clayton seeks review of the judgment of the Court of Appeals reversing the Order of the District Court.[4]

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[4]Since the Court of Appeals' determination that private rights of action are available to remedy violations of Sections 5(d) and 5a(8) of the Commodity Exchange Act does not affect the claims asserted against Clayton, Clayton does not seek review of that determination. The New York Mercantile Exchange, however, has filed a Petition for Certiorari with this Court seeking review of that holding. *New York Mercantile Exchange* v. *Leist*, Docket No. 80-757. Additionally, we are informed by counsel for Heinold that Heinold and TMAK will file a joint Petition for Certiorari seeking review of the decision of the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

This Court should grant this Petition For A Writ of Certiorari because the federal question presented — whether the violation of Sections 4a, 4b and 9(b) of the Commodity Exchange Act gives rise to private rights of action against FCMs based on that statute — is of such national significance that it properly should be resolved by this Court at the present time and because the federal questions presented were decided in a manner which conflicts with this Court's decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560; and *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

I. The Questions Of Federal Law Presented By This Case Are Of National Importance And Should Be Decided By This Court At This Time

It has been estimated that 58.5 million commodity futures contracts having an aggregate value in excess of 1.5 trillion dollars are traded annually on the nation's commodity enchanges.[5] Hundreds of thousands of persons have a direct interst in these transactions, either because the transactions are made for their account or because as market professionals they have a role in the process by which the transactions are effected.[6] The resolution of the questions presented for review is of extraordinary practical significance to all of these persons because it will determine whether the federal district courts are to serve as a forum in which private complaints arising out of transactions in the commodity futures markets may be heard.

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[5] Wall St. J., Jan. 9, 1979, at 30, col. 1 (Midwest Ed.) (estimate for 1978).

[6] Remarks of Philip F. Johnson, Chairman, ABA Committee on Commodities Regulation, 35 Bus. Law. 691 (Special Issue) (March, 1980); Remarks of Hon. James M. Stone, Chairman, Commodity Futures Trading Commission, *Id.* at 692.

The legal ramifications of this case will extend well beyond the commodity futures industry. The determination of the proper basis for judicial recognition of private rights of action based on federal statutes which do not in express terms create such rights will have an impact on each industry which Congress has chosen to regulate.

As the decisions cited below indicate, the lower federal courts are in a quandary over how to resolve the vexing question presented for review. The guidance of this Court is necessary to resolve conclusively, for the benefit of all the participants in the commodity futures markets, where and how they may call or be called to account for activities involving the commodity futures markets, and to delineate more clearly the respective roles of the judicial and legislative branches of the federal government in creating federal private rights of action.

A. This Court Should Exercise Its Jurisdiction In This Case To Assure That Private Rights Of Action Based Upon The Commodity Exchange Act Are Not Created By Judicial Legislation

The decision in this case is one of two recently rendered by United States Courts of Appeals addressing the issue whether private rights of action are available to remedy violations of certain provisions of the CEA.[7] Both the Majority in the Second Circuit and the Majority in the Sixth Circuit which decided the case of *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980) held that private rights of action are available to remedy violations of certain provisions of the CEA. The *Curran* court aptly described its decision (and, unknowingly, the subsequent decision in this case) in the following manner:

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[7] In addition to the Second Circuit's decision in this case, the Sixth Circuit has determined that a private right of action is to be implied from the provisions of Section 4b of the CEA, 7 U.S.C. §6b, on

> What we have done here, in our view, is to preserve the general concept of a private right of action and to provide for its continuing development . . . . This approach . . . allows for the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5. *Id.* at 236.

When this Court recognized an implied private right of action based upon violations of Section 10b of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, the Court "simply explicitly acquiesced in the 25-year-old acceptance by the lower federal courts . . . ." *Touche Ross & Co.* v. *Redington,* 442 U.S. at 577, n.19. The Court made no determination whether Congress had intended to create private rights of action based on violations of Section 10b. Thus, for purely historical reasons this Court did not consider the propriety of recognizing private rights of action based on Section 10b and Rule 10b-5 under the standards which this Court has indicated are dispositive of such issues. *Cannon* v. *University of Chicago,* 441 U.S. at 690-93, n.13. The result, as this Court described it in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), is that "private actions under Rule 10b-5 . . . [constitute] a judicial oak which has grown from little more than a legislative acorn." *Id.* at 737.

At the present time, there is no similar history of long-standing, uniform lower court interpretations of Sections 4a, 4b and 9(b) of the CEA. The district courts are in sharp disagreement over whether those sections of the CEA should be construed to create private rights of action. (A 5, 43-44 n.19). Unless this Court exercises its jurisdiction in this case, however,

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behalf of a customer who sues his commodity futures broker. *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 622 F.2d 216 (6th Cir. 1980). The defendant in that case has filed a Petition For Certiorari. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran,* Docket No. 80-203.

such a history may develop, based largely on the precedent of the decisions of the Second Circuit in this case and the Sixth Circuit in *Curran*. As the discussion *infra*, at pp. 18-23, demonstrates, these two decisions were reached in a manner which clearly conflicts with the controlling decisions of this Court. This Court should exercise its jurisdiction over this case to foreclose any possibility that private rights of action based on provisions of the CEA will be created by judicial rather than congressional legislation.

B. There Is Substantial And Recurrent Disagreement Among The Federal Judiciary Concerning Whether Private Civil Actions For Damages Are Among The Remedies Available For Violation Of Sections 4a, 4b and 9(b) Of The Commodity Exchange Act

Since 1974, no fewer than twenty-seven reported decisions of the lower federal courts have considered whether a private right of action is available to redress alleged violations of one or another of the Sections of the CEA.[9] These decisions generally recognized that "congressional intent" is a touchstone for determining whether a private right of action is implicitly created by a federal statute. Neither the judges of the two courts of appeals which have considered the question presented for review nor the federal district judges are in agreement, however, on the nature of the congressional intent which must be evident in order to imply a private right of action from a provision of the CEA. These judges also disagree on whether there exists, assuming a particular standard is to be followed, the requisite congressional intent to create a private right of action for violation of particular provisions of the CEA.

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[9] A 43-44, n.19. Most of these cases have involved allegations of fraud on the part of an FCM and were brought by customers of the FCM who seek to recover damages on the basis of Section 4b of the CEA. Several, however, have involved claims based on Section 4a and/or Section 9(b).

The Opinions filed in the Court of Appeals in this case illustrate these disagreements. As one court described them: "Writing for the majority, Judge Friendly wrote a scholarly eighty-six page opinion, concluding that a private right of action for damages did exist. Proceeding from the same authorities, however, Judge Mansfield wrote an equally learned opinion, this one seventy-six pages in length, arriving at the directly opposite conclusion." *Deneau* v. *Amtel, Inc.* [current] Fed. Sec. L. Rep. (CCH) ¶97,645 at p. 98,459 (S.D.N.Y. 1980).

Judge Friendly viewed the determinative question before the court to be whether Congress had demonstrated an intention, when it amended the CEA in 1974, to "alter the significance" that the courts had previously assigned to Sections 4a, 4b, 5(d), 5a(8) and 9(b) of the CEA. (A 45). He determined, based upon the legislative history of the amendments, that Congress had not so intended. He thus concluded that private rights of action should be recognized as an available remedy for violation of those Sections of the CEA. (A 88-89).

Judge Mansfield viewed the determinative question before the court to be whether Congress had ever indicated its intention to create private rights of action for violation of any of Sections 4a, 4b, 5(d), 5a(8) or 9(b) of the CEA. (A 95). He determined that Congress had not demonstrated such an intention, either when the provisions in question were first enacted or when the CEA was amended. On that basis Judge Mansfield reasoned that private rights of action are not among the remedies available for violations of the CEA. (A 91, 108-126). Moreover, Judge Mansfield found no persuasive evidence, either in the legislative history of the amendments or in the amendments themselves, of any congressional intent to approve of the court decisions implying a private right of action from the CEA. (A 141-160). He concluded that since such approval was a necessary predicate to employing the form of analysis which Judge Friendly used, Judge Friendly's form of analysis was improper. (A 161-167).

These same disagreements surfaced in the majority and dissenting opinions in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, supra.* Comparison of the numerous district court opinions discussing private rights of action based on provisions of the CEA reveals the same disagreements among the federal district judges. *Compare, e.g., Fischer* v. *Rosenthal & Co.*, 481 F.Supp. 53 (N.D.Tex. 1979)(no private right of action; expressly specified remedies must be viewed as exclusive, particularly in light of congressional refusal to adopt amendments expressly creating private rights of action when amending CEA) *with Poplar Grove Planting and Refining Co.* v. *Bache Halsey Stuart Inc.*, 465 F. Supp. 585 (N.D.La. 1979) (private right of action implied; legislative history of 1974 amendments to CEA reveals congressional intent to create such rights for protection of traders); and *Gonzalez* v. *Paine, Webber, Jackson & Curtis, Inc.*, 493 F.Supp. 499 (1980) (no private right of action; 1974 amendments demonstrate intent that private rights of action based on CEA should no longer be available) *with Alken* v. *Lerner*, 485 F. Supp. 871 (D.N.J. 1980) (private right of action implied; no evidence of congressional intent to legislatively overrule prior court decisions).

The already decided and reported cases in which the existence of private rights of action based on sections of the CEA has been litigated represent but a small portion of the cases in which the issue is being presented for decision by the lower federal courts. Clayton is a party to several pending cases in which motions to dismiss grounded on the nonexistence of private rights of action under Section 4b of the CEA are now pending.[*] Clayton's situation in this regard is by no means unique among

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[*] *See, e.g., Milton Friend, et al.* v. *Clayton Brokerage Co. of St. Louis, Inc., et al.*, CA3-79-0182R (N.D.Tex.); *Horace G. Woodburn* v. *Clayton Brokerage Co. of St. Louis, Inc., et al.*, CA3-80-0669-D (N.D.Tex.); *William F. Minor, et al.* v. *Clayton Brokerage Co. of St. Louis, Inc.*, 80-6175-Civ NCR (S.D.Fla.) *William Belliveau, et al.* v. *Clayton Brokerage Co. of St. Louis, Inc.*, CA No. 80-1642 (D.N.J.).

the 329 brokerage firms[10] now engaged in the commodity futures industry.[11] Given the proliferation of litigation in which the existence of a private right of action to enforce provisions of the CEA is being challenged and the division of existing authorities which have considered the issue, substantial amounts of the scarce judicial resources of the lower federal courts will undoubtedly continue to be expended in an effort to resolve the issues presented by the case. There appears to be little likelihood that a soundly reasoned consensus of authority will develop as a consequence of those efforts. This unconstructive expenditure of judicial energies can be avoided if this Court issues the writ of certiorari in this case and resolves, once and for all, whether a private right of action is available against FCMs to remedy violations of Sections 4a, 4b, or 9(b) of the CEA.

C. There Is Continued Uncertainty Concerning The Basis For Implying Private Rights Of Action From Federal Statutes Which Do Not, In Express Terms, Create Such Rights.

The disagreement within the federal judiciary concerning whether private rights of action are available to remedy violations of the CEA is merely symptomatic of the continued uncertainty regarding a much broader federal question: what is the proper basis for implying a private right of action from a federal statute which does not, in express terms, create such a right.

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[10] Remarks of Philip F. Johnson, Chairman, ABA Committee on Commodities Regulation, 35 Bus. Law. 691 (Special Issue) (March, 1980).

[11] *See, e.g.*, Petition for Writ of Certiorari, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, Docket No. 80-203 at p. 15, listing 5 pending cases to which Merrill Lynch is a party in which the same issues are being litigated.

This Court's recent decisions involving the implication of a private right of action from a federal statute clearly indicate that a restrictive approach is required when a court attempts to determine whether to imply a private right of action. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 19-20, 23; *Touche Ross & Co.* v. *Redington*, 442 U.S. at 578; *Cannon* v. *University of Chicago*, 441 U.S. at 718 (Rehnquist, J., concurring); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). These decisions, however, have cast the issue of whether private rights of action are available based upon the statutes relied on by the plaintiffs as problems in statutory construction. This has been taken by some courts as an invitation to invoke any of the panoply of "rules" of statutory construction which will permit the court to justify finding the existence of the asserted private right of action and even to expand the scope of the "rules" when necessary. The Majority below accepted this perceived invitation. Its opinion exemplifies the art of statutory construction which has come into vogue among federal courts determined to take an expansive approach to implying private rights of action from federal statutes.

The Majority perceived the array of remedies expressly prescribed by the CEA—fines (7 U.S.C. § 13), injunctions (7 U.S.C. § 13a-1), imprisonment (7 U.S.C. §13), administrative sanctions (7 U.S.C. §§ 8, 9), damage awards in reparations (7 U.S.C. § 18)—as inadequate, in part because, in the Majority's view, persons claiming injury as a consequence of violations of the CEA could not, in all cases, proceed directly against all persons responsible for the allegedly injurious conduct. (A 66-67). The fact that the Majority even engaged in this analysis demonstrates that the Majority's notions of appropriate policy were being substituted for analysis of the intent of Congress. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568, quoting *Cannon* v. *University of Chicago*, 441 U.S. at 688. The Majority decided that private

rights of action were appropriate in this case since that form of remedy would adequately protect injured parties and was consistent with the remedies made available under the federal securities laws, which the majority viewed as parallel statutes. (A 67, 75, 78). They applied the "rule" of statutory construction which states that the reenactment of the statute incorporates existing constructions of the statute. (A 45-46). This "rule" enabled them to "construe" the CEA to provide private rights of action against FCMs for violations of Sections 4a, 4b, and 9(b) of the CEA.

The provisions of the CEA have never been reenacted. The CEA was, however, amended on several occasions. The most significant amendment occurred with the enactment of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (1974) (the "CFTC Act"). The CFTC Act did not alter the language of Sections 4a, 4b and 9(b) of the CEA relied on by the Majority, although these provisions were amended in respects not relevant to this case.[12]

The provisions of the CEA had never been construed, prior to 1974, as creating private rights of action for violation of Sections 4a, 4b or 9(b). In 1967, the court in *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967) relied on general principles of tort law (the same principles which this Court held inapplicable to the construction of federal statutes in *Touche Ross & Co.* v. *Redington*, 422 U.S. at 568) to support its determination that "[v]iolation of the standard of conduct set out in Section 6b of the Commodity Exchange Act [referring to Section

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[12]Section 4a was revised by deleting the statutory definition of "hedging" and authorizing the Commodity Futures Trading Commission to define the term. Section 4b was amended by deleting a reference to "cotton" and substituting the term "a commodity" in a subpart of the provision which is unrelated to the transactions at issue in this case. Section 9(b) was amended to increase the fines for felonious manipulation from $10,000 to $100,000.

4b of the CEA, 7 U.S.C. § 6b] is a tort for which plaintiffs . . . have a federal civil remedy even in the absence of specific mention of a civil remedy in the Commodity Exchange Act." *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. at 447. The Court in *Goodman* never exhibited any effort to construe the provisions of the CEA alleged to have been violated. If the *Goodman* court can be said to have construed anything at all, it would be the general principles of tort law which it "construed" to be applicable to cases involving federal statutes. During the succeeding seven years, a number of other cases reached substantially the same result. Those cases were all based either upon unquestioned reliance on *Goodman* or on other cases which themselves placed unquestioned reliance on *Goodman*.

Thus, when Congress amended the CEA in 1974, there was no existing construction of any provision of the CEA which held that any section of the CEA created a private right of action.

The Majority nevertheless invoked the "rule" referred to above. On the basis of the "rule" and scattered fragments of legislative history, consisting largely of statements of partisan witnesses and individual members of Congress who sought, unsuccessfully, to secure the passage of proposed provisions of the CFTC Act which would have created private rights of action for violation of any provision of the CEA, the Majority held that such rights of action had been "implicitly approved by Congress." (A 46).

Many courts have "construed" other federal statutes as implicitly creating private rights of action under circumstances in which the Court's notion of appropriate policy seemed to dictate that a private right of action should be available.[11] Other

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[11] *See, e.g., National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222 (3rd Cir. 1980) (implying private right of action from Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, despite existence of other express remedies under the statute for the alleged conduct); *Chumney* v. *Nixon*, 615 F.2d 389 (6th Cir. 1980) (implying

courts have adopted a more constrained approach to this type of issue. These courts have declined to recognize private rights of action to enforce federal statutes in the absence of clear indicia that Congress intended to make such rights of action available.[14] This dichotomy in approaches to the problem of implied private rights of action indicates the confusion which persists over when and why a private right of action based on a federal statute should be recognized by the courts. This Court's resolution of the issues presented in this case can only serve to clarify the applicable standards, reducing, if not eliminating, the uncertainty which now prevails.

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private right of action from criminal statute prohibiting assualt and battery while aboard commercial aircraft, 18 U.S.C. § 113(d)); *Bratton* v. *Shiffrin*, 15 Av.Cas. 18,076 (7th Cir. March 10, 1980) (finding that charter air travelers have an implied right to sue under Section 401(n)(2) of the Federal Aviation Act, 49 U.S.C. §1371(n)(2), for violations of Civil Aeronautics Board regulations governing charter arrangements, despite recognizing that the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful); *Vega* v. *First Federal Savings & Loan Ass'n of Detroit*, 622 F.2d 918 (6th Cir. 1980) (finding, without explanation, an implied private right of action for violation of the Real Estate Settlement Practices Act, 12 U.S.C. §§2601 et seq.); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979) (finding an implied private right of action to enforce Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794); *Sierra Club* v. *Andrus*, 610 F.2d 581 (9th Cir. 1979) (finding an implied private right of action to enforce Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403); *see also* cases cited at Cannon v. *University of Chicago*, 441 U.S. at 741-742.

[14]*See, e.g., Taylor* v. *Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980) (holding no private right of action under OSHA, 29 U.S.C. §§651-678); *United States* v. *Capelitti Brothers, Inc.*, 621 F.2d 1309 (5th Cir. 1980) (holding no private right of action for violations of Section 1 of the Davis-Bacon Act, 40 U.S.C. §276a); *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980) (holding no private right of action to enforce Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793).

II. The Court Of Appeals' Decision To Recognize Private Rights Of Action For Violations Of The Commodity Exchange Act Conflicts With The Applicable Decisions Of This Court

A. The Majority's Refusal To Examine The Congressional Intent To Create The Private Rights Of Action Asserted By Respondents Cannot Be Reconciled With This Court's Decision In *Touche Ross*

In *Touche Ross, supra,* this Court explicitly held that the task of a court determining whether a private right of action is available based on a federal statute which does not, in express terms, create such a right of action

> is limited *solely* to determining whether Congress intended to create the private right of action asserted....*Id.* at 568. (emphasis added)

The Majority expressly declined to determine whether Congress intended to create the private rights of action asserted by Respondents. (A 45-46). Instead, the Majority invoked the "rule" of statutory construction which gives rise to the presumption that Congress is aware of existing "interpretations" of law. Relying on this presumption, the Majority reasoned that Congress would have clearly expressed itself had it desired to change the status quo. Based on this theory, the Majority inquired only whether the CFTC Act or its legislative history contained indicia of a contrary Congressional intent sufficient to rebut the Majority's presumption that congressional silence indicated congressional approval of the status quo. (A 46).

This device enabled the Majority to avoid the meticulous section by section analysis of statutorily created rights and duties which this Court has described as "the most accurate indicator of the propriety of implication of a cause of action." *Cannon* v. *University of Chicago,* 441 U.S. at 690, n.13. The plain language of Sections 4a and 9(b) of the CEA indicates that these provisions were not enacted for the benefit of speculators, such

as Respondents, but for the protection of the public at large against the impact of speculators' activities, *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D.Ill. 1979). As the Majority conceded, the express terms of Section 4b of the CEA cannot be read as creating rights in favor of persons other than customers against persons other than their brokers. (a 91). Sixty-four years ago this Court recognized that if a private right of action is to be implied under a statute, it should be implied only in favor of those for whose especial benefit that statute was enacted and against those upon whom a duty is imposed by the statute. *Texas & P. Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916). The Statutes at issue here did not create rights in favor of Respondents or impose duties upon Clayton for Respondents' benefit. Thus, the right-duty analysis demonstrates that no private right of action can properly be implied in favor of Respondents against Clayton in this case.[11]

B. The Majority's Failure To Treat Congress' Designation Of Remedies For Violations Of The CEA As Exclusive Is In Derogation Of The Principles Enunciated In *Transamerica*

Other aspects of the analysis dictated by this Court's decisions compel the same conclusion. In order for the Majority to recognize private rights of action in favor of Respondents, it had to also ignore this Court's admonition, set forth in *Transamerica, supra,*

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[11]A determination that no private right of action is available in this case on the basis of Section 4b of the Commodity Exchange Act will not necessarily be dispositive of the question for cases, such as *Curran* v. *Merrill Lynch, Pierce Fenner & Smith, Inc., supra,* in which a customer alleges fraud by his FCM. Either the refusal of this Court to hear this case, leaving the decision of the Court of Appeals to stand as valid precedent, or a decision by this Court that Section 4b will support a private cause of action against Clayton in this case will necessarily be viewed as an indication that private rights of action are available under Section 4b for all disputes which routinely arise between brokers and their customers.

> that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 444 U.S. at 19.

Section 14 of the CEA expressly provides that "*Any* person complaining of *any* violation of [the CEA] or any rule, regulation or order thereunder by any person who is registered . . . ." (emphasis added) with the CFTC pursuant to the terms of the CEA may file a complaint with the CFTC. The CFTC, after a proceeding to determine the merits of the complaint, may award the complainant the damages sustained by him. The reparations procedure (which was created by the CFTC Act) provides persons allegedly injured by violations of the CEA committed by persons who are registered or required to be registered with the CFTC with an opportunity for full and complete relief.[16] Had Congress, which gave no indication prior to 1974 of any intention to create private remedies (in any form) for violation of the CEA,[17] intended that private remedies in addition to those expressly provided for in the CFTC Act should be available, it cer-

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[16] As a practical matter, reparations will be available almost every time the CEA is violated and some person harmed. The registration provisions of the CEA are so broad that it will be a rare instance in which a transaction in commodity futures can be effectuated without the participation of persons who are registered or required to be registered under the CEA. Section 13 of the CEA, 7 U.S.C. § 13c, subjects any person who aids and abets a violation of the CEA to liability as a principal in administrative proceedings, such as reparations, under the CEA. In those rare instances in which there is no basis for invoking the reparations procedures the CEA expressly enables the individual states to recover damages on behalf of their citizens for violations of the CEA. 7 U.S.C. § 13a-2. The Majority's concerns, therefore, that persons aggrieved by violations of the CEA will be without a remedy and that persons such as the Short Traders in this case may escape from civil liability to the injured parties, are unfounded.

[17] Prior to 1974, parties injured by violations of the Commodity Exchange Act were expressly directed to their remedies under state law. From 1936 until 1974, Section 4c of the Commodity Exchange Act, 7 U.S.C. § 6c, provided that the provisions of Sections 4b and 4c

tainly knew how to provide for those additional remedies. Presumably, it would have done so expressly when it enacted the CFTC Act. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 21.

C. The Decision Below Results In An Unconstitutional Usurpation of Legislative Power By The Court

In light of Congress' deliberate creation of a specific form of private remedy for precisely the same conduct complained of by Respondents in this case, Congress' failure to provide expressly for the private rights of action asserted by Respondents can only be viewed as meaning that Congress did not intend the rights of action to exist. *Touche Ross & Co.* v. *Redington*, 422 U.S. at 573-74. Consequently, the decision to recognize the rights of action asserted by Respondents necessarily required the superimposition of the Majority's notions of appropriate remedies over those of Congress. This Court has long recognized that the doctrine of separation of powers prohibits courts from engaging in such usurpations of legislative prerogatives. *See, e.g., T.V.A.* v. *Hill*, 437 U.S. 153, 194, 196 (1978); *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 11 (1942); *see also Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

Article I, Section 1 of the Constitution of the United States clearly and unambiguously vests all of the legislative powers of the federal government with the Congress. Unquestionably the creation of private rights by the enactment of federal statutes is a legislative task, to be carried out in light of the political pressures and policy considerations which must be taken into

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of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 6c, should not "be construed to impair any State law applicable to any transaction enumerated or described in such sections." 7 U.S.C. § 6c (1970). Thus, prior to 1974, injured persons may have had a remedy for actions which constituted violations of the Commodity Exchange Act; the available remedies, however, were prescribed by state, rather than federal law. The quoted language of Section 4c was repealed by the CFTC Act. This clearly indicates Congress' intent that injured parties should be limited to the expressly provided federal remedies.

account by legislators who are answerable to their constituents at each election. *Cannon* v. *University of Chicago*, 441 U.S. at 742-45 (Powell, J., dissenting); *see also Touche Ross & Co.* v. *Redington*, 442 U.S. at 568-571; *Cannon* v. *University of Chicago*, 441 U.S. at 717-18 (Rehnquist, J., concurring); *Chrysler Corp.* v. *Brown*, 441 U.S. at 317. The CEA as it exists today gives clear evidence of a careful balancing of the respective interests and concerns of various opposing groups, arrived at as a result of the legislative process.[18] When the judiciary, which is intentionally insulated from political pressure, attempts to substitute its notions of the appropriate fashion in which to resolve disputes between parties for those of Congress by recognizing private rights of action which Congress omitted from a particular regulatory scheme, there is a substantial risk that it will "frustrate those alternative processes that exist to resolve such disputes and . . . may dramatically revise the balance of interests struck by the legislation." *Cannon* v. *Univeristy of Chicago*, 441 U.S. at 748, n.19 (Powell, J., dissenting) *citing Santa Fe Industries* v. *Green*, 430 U.S. 462, 478-79 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. at 739-44.[19]

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[18] *See*, for example, the discussion in the Majority's opinion describing the evolution of §5a(11)(ii) of the Act, 7 U.S.C. §7a(11)(ii). (A 61).

[19] This suit, along with several others, has caused precisely this kind of disruption. The Exchange has conducted proceedings to investigate the acts and events at issue, to compensate those damaged as a result of the acts and events, and to penalize those responsible, as mandated by the Rules of the Exchange. The CFTC also conducted an investigation and initiated administrative proceedings against certain of the persons who are defendants in the case below (but not against Clayton). No reparations proceedings have been instituted against Clayton on the basis of the acts and events complained of by Respondents. Instead, Clayton, Heinold and TMAK have been forced to expend their resources defending themselves in both federal and state courts against numerous suits arising out of the events described above, forcing numerous courts to devote scarce time and resources to unravelling issues which Congress contemplated would be handled by the CFTC.

This Court's decisions plainly dictate that the courts should not recognize a private right of action to enforce a federal statute unless it clearly appears that Congress intended to create such a right of action. The Majority in the Court of Appeals did not discern such an intent, and, indeed, none can be discerned from any available evidence. The decision in the Court of Appeals, therefore, conflicts with the controlling decisions of this Court. It should be reversed to ensure a proper result in this case and the many pending cases in which private rights of action based on Section 4a, 4b or 9(b) of the CEA are at issue.

CONCLUSION

For all the reasons set forth above, Petitioner Clayton Brokerage Co. of St. Louis, Inc. respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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